



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-173589

SEP 30 1971

Dear Mr. Secretary:

We refer to a letter dated September 8, 1971, signed by Warren L. Brecht for the Assistant Secretary of the Interior, forwarding a report and file on the protest of General Constructors Company, Inc. (General Constructors), against award by the Government of American Samoa (G.A.S.) of construction contract 220-002-71 to Beck-Norcoast (Beck) under an invitation for bids issued May 1, 1971. The letter expresses the view of your Department that the matter is for resolution between the protesting bidder and the Government of American Samoa; however, an advisory opinion by our Office is requested in light of the importance of the matter and the interest therein of several members of the Congress.

The invitation for bids described the contract work as construction of fiscal year 1970 and 1971 Water and Sewerage Programs, Tutuila Island, American Samoa. The basic work was divided into two groups of projects, one group being captioned "Water Projects" and the other "Sewer Projects," and additive items were listed for all of the projects. Bidders were advised concerning award as follows:

"Award will be made on: Total All Bid Items, Sum of Base Bid Items or Sum of Base Bid Items plus Additive Bids selected by G.A.S., all subject to availability of funds and Instructions to Bidders. Additive Bids will not be awarded without Base Bid Items but may be awarded after award of Base Bid Items, but within sixty (60) days of receipt of bids." [Addendum No. 4]

"(14) AWARD OR REJECTION OF BIDS

"The contract will be awarded, in whole or in part, according to the provisions of these contract documents, to the lowest responsible bidder complying with the conditions of the invitation for bids, providing his bid is reasonable and otherwise responsible, and it is in the interest of the Government to accept the bid. The bidder to whom the award is made will be notified at the earliest possible date. The Government, however, reserves the right to reject any and all bids and to waive any informality in bids received whenever such rejection or

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waiver is in the interest of the Government. The Government reserves the right to reject the bid of a bidder who cannot demonstrate to the satisfaction of the Contracting Officer his ability to perform the work bid upon." [Instructions to Bidders]

Paragraph 8 of the Special Conditions of the IFB stated:

"GOVERNMENT OF AMERICAN SAMOA AS CONTRACTING PARTY

"The contract shall be between the Contractor and the Government of American Samoa. Neither the Government of the United States nor any Agency thereof shall be a party to the contract. No conclusion or inference to the contrary shall be drawn from the fact that United States Government forms are used, or from the use by the Government of American Samoa of terminology, procedures, or practices similar to those in use by the Government of the United States."

(See, also, paragraph 1.(a) of the General Provisions of the contract.)

Paragraph 54 of the Special Conditions included the following pertinent language:

"APPLICABLE LAW

"This contract shall be construed according to contract law applicable to U.S. Government contracts and so much of the laws of American Samoa as are not inconsistent therewith. All references to laws enacted by the Congress of the United States of America made applicable to this contract by inclusion or reference in the General and Special Provisions shall be applicable regardless whether the law is specifically made applicable to American Samoa."

On June 21, 1971, bids were opened. For the base bid items General Constructors was low with a bid of \$1,295,000 and Beck was second low with a bid of \$1,394,371. For the additive, items, Beck

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was low with a total price of \$885,392. General Constructors' bid for the additives totalled \$1,304,000. The G.A.S. estimates totalled \$933,095 for the base bid items and \$744,880 for all additives.

On June 24, the Director, Department of Public Works, G.A.S., issued a memorandum recommending to the contracting officer that the base items be awarded to Beck immediately at its bid price of \$1,394,371 and that certain water and sewer additive items, in the total amount of \$724,356 should be awarded after July 1 but prior to August 20, the date of expiration of the 60-day bid acceptance period.

Review of the above recommendation was made by the Deputy Director, Department of Administrative Services, G.A.S., who stated, in a memorandum dated June 25, that if only the base bids were considered, General Constructors would be the lowest bidder. It was further stated, however, that if the recommended additives were included in the award, Beck would be the lowest bidder. Respecting availability of funds for the contract work the memorandum included the following pertinent statements:

"Our analysis of available funds for the project shows that:

- "1. We have sufficient funds to finance the base bids for the water and sewer projects.
- "2. Sufficient funds will be available to finance the sewer additives recommended by the Director of Public Works when our FY 1972 budget is approved. Since our budget has been through both the House and Senate, we are virtually assured that no budget cuts will be made.
- "3. It is questionable whether we will have sufficient funds to finance the water additives recommended by Clark. However, we will have to wait until our books are closed for FY 1971 (about July 31), until we can come up with a firm answer.

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"Summary:

"We have sufficient funds at this time for the base bids as well as the sewer additives, but the funding for the water additives is questionable.

"As the analysis shows above, if we add the sewer additives to the base bid, B-E-C-K is the lower overall bidder; if we can fund the water additives, B-E-C-K is still lower overall.

"We therefore concur with the Director of Public Works' recommendations to award to B-E-C-K; however, we cannot at this time agree that we can award the water additives at a later date. We will check with the Attorney General's Office to make sure we are on firm legal grounds before we actually make the award."

By telegram dated June 29, 1971, Beck was notified by the contracting officer that it was low bidder on the base bid items in combination with certain additive items selected by G.A.S.; that it was awarded a contract for the base items at its bid price of \$1,394,371; and that award of the selected additive items would be made on or after July 1 but no later than August 20. Contract No. 220-002-71 dated June 30, 1971, showed the contract price as \$1,394,371 followed by the notation:

"Contract Price to be increased to include Additive Bid Projects to be selected by the Government. Additive Bid Projects shall be awarded at the Contractors bid prices received 21 June 1971. Additive Bid Projects shall be awarded on or before 20 August 1971."

There is nothing in the award notice or in the contract which identifies the additives to be subsequently awarded to Beck or the total price of the additives. However the record indicates the following were included in considering to whom the award should be made:

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	<u>Recommended Sewer Additives</u>	<u>Recommended Water Additives</u>
Beck	\$481,291	\$242,065
General Constructors	\$764,000	\$337,000

General Constructors contends that, as the lowest bidder for the base items, it was entitled to award in preference to Beck. In this connection General Constructors maintains that the making of an award to Beck for the base items from fiscal year 1971 funds and a projected award of additive items from fiscal year 1972 funds, which were not available for expenditure at the time of award, is illegal and is contrary to the Federal Procurement Regulations (FPR) in that it constitutes an award on a basis other than as set forth in the IFB.

Attorneys for the contractor stress that there was no preaward protest to the Government of American Samoa by any bidder against the terms of the invitation for bids. Further, the attorneys maintain that the invitation contemplated award of additives in addition to the base bid items and that the contract which has been awarded to Beck includes the additives as an integral part thereof and accordingly complies with the invitation since Beck is the lowest bidder on the combination of basic items and additives awarded.

The Assistant Secretary concurs with the award as made in light of the reported availability of sufficient funds to cover the base items and the sewer additives selected by the contracting officer. Such information, it is further stated, would have been made available to General Constructors had it requested from the contracting officer a copy of the abstract of bids.

Concerning applicability to the procurement of the FPR, the Assistant Secretary states:

"It should be noted at the outset that this procurement is not a Federal transaction, but a request for bids advertised and solicited by the Government of American

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Samoa. Under those circumstances the question of jurisdiction to consider a protest against the award of a local territorial government contract by the Comptroller General is a pertinent issue. It has been a well established rule that American Samoa does not fall within the term 'Executive agency' as used in the Federal Property and Administrative Services Act and implemented by the FPR. In short, the Federal Property and Administrative Services Act and the FPR are not applicable to procurements by the Government of American Samoa. See Interior Solicitor's Opinion, M-36713 (October 30, 1967); Comptroller General (unreported) B-169707 (August 31, 1970) and B-36222 (September 29, 1955). It is true, however, that the provisions of the FPR are adhered to when feasible, but due to unusual circumstances, territorial governments may resort to other methods of contracting and procurement. These contract and procurement procedures are acceptable as long as they do not violate the local constitution and law or are not at variance with the applicable Federal Law and Constitution."

In line with the foregoing, the Assistant Secretary states that the protest should have been directed to the Governor of American Samoa rather than to our Office.

In 46 Comp. Gen. 586[✓] (1966) we noted that the operating expenses of the office of the Governor of American Samoa and the expenses of the legislative and judicial branches of the Government of American Samoa are financed entirely from Federal appropriations, while all other governmental activities of American Samoa are financed by Federal grants supplemented by local revenues. Reference to the Department of the Interior and Related Agencies Appropriation Acts for 1971 and 1972 (Public Laws 91-361 and 92-76) reveals that all funds appropriated thereunder, insofar as the Government of American Samoa is concerned, are not available for obligation before the start of the fiscal year involved.

As to the grants by your Department to American Samoa for support of its governmental functions, for use in addition to current local revenues, we have applied the well-settled rule applicable to grant funds transferred by the Federal Government to the various states of

the United States; i.e., the grant funds become the property of the transferees and are not subject to the statutory restrictions applicable to the expenditure of appropriated moneys unless such restrictions are made a condition of the grant. B-131569 June 11, 1957. Further, we have held that the Federal Procurement Regulations do not apply to a procurement by the Government of American Samoa which is thus financed. B-169707 August 31, 1970.

In line with the above, since the procurement under consideration will be financed from grants by your Department and from local revenues, application of the FPR is not mandatory. However, from the language of paragraph 14 of the instructions to bidders in the invitation for bids issued by G.A.S., it is evident that it was the intent of G.A.S. to make award under this procurement on the same basis as awards of advertised procurements are made under FPR 1-2.407-1 and 41 U.S.C. 253(b) i.e., to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered.

In an advertised construction procurement such as is involved here, in which, because of funding limitations, it may not be possible to procure all of the work for which a need exists, the invitation for bids properly may solicit a base bid on certain work and bids on various additives, the award to be made within the limits of funds which may become available by the time of award. Further, the invitation may properly provide that the selection of the additive items which are to be awarded in combination with the base bid items may be made after opening of bids. Such provisions do not violate requirements that public contracts be let to the lowest bidder. B-148333 April 9, 1962; 45 Comp. Gen. 65 (1966). In making award under such provisions, however, the lowest bid should be measured by the total work to be awarded. Any measure which incorporates more or less than the work to be contracted for in selecting the lowest bidder does not obtain the benefits of full competition, which is one of the chief purposes of the public procurement statutes. 41 Comp. Gen. 709 (1962); 50 Comp. Gen. ____ (B-171813, February 19, 1971).

We are mindful that had the United States been made party to, or obligated by, the contract, the provisions of 41 U.S.C. 11 and 12 against execution of a contract binding the United States without adequate appropriation therefor would have been applicable to the

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procurement. As stated above, however, since grant funds are being used to finance the contract in question, it is not subject to the restrictions set out in 41 U.S.C. 11 and 12. Further, there is no indication in the record that any provision similar to 41 U.S.C. 11 and 12 applies to such a contract under the laws of American Samoa.

While the invitation for bids in this case advised bidders that the award would be governed by the availability of funds and the instructions to bidders, it also advised that additive items might be awarded as late as 60 days after receipt of bids, or August 20, 1971. The invitation therefore placed bidders on notice that fiscal year 1972 funds might be involved in the financing of the contract. Apparently no bidder objected to such provisions. In addition, Beck was the lowest bidder for all of the work which was approved for award. In the circumstances, and since we understand that the fiscal year 1971 funds were required to be obligated no later than June 30, 1971, we are unable to conclude that the selection of Beck for the contract was not in accord with the provisions of the invitation for bids and the rules of competitive bidding as reflected in the decisions of our Office and in the FPR.

As to the contract which was actually awarded to Beck on June 29, 1971, we note that the contract price was shown as \$1,394,571, the amount of Beck's bid for the base items, subject to increase to include the additive bid items selected by G.A.S. at the prices quoted in Beck's bid. Undoubtedly, this method of award was employed to avoid commitment of G.A.S. to any definite amount for the additives inasmuch as the fiscal year 1972 grant funds to be used therefor were yet to be appropriated by the Congress of the United States and were not available to G.A.S. on the date of award. We suggest, however, that to avoid any question as to the extent of the award, the better procedure would have been to identify in the contract, the selected additives approved by G.A.S. for award, and to have so advised the unsuccessful bidder. However, in view of our understanding that the sewer additives which were approved for award in the memorandum of June 25 by the Deputy Director, Department of Administrative Services, G.A.S., have now been awarded to Beck under the contract, and the total price of the contract would therefore appear to be lowest, we are unable to see any valid basis on which objection could presently be made to the validity of the contract. Accordingly, it is our opinion that the protest must be denied.

AMERICAN SAMOA
status
Contract matters
Applicability of Federal laws

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If we can be of any further assistance, please advise us.

The file which accompanied the letter of the Assistant Secretary is returned, together with a copy of our letter of today to General Constructors.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States

Enclosures

APPROPRIATIONS
Funds which lose identity as Federal funds
Grants-in-aid, etc.

The Honorable
The Secretary of the Interior

BIDS
Award data
Aggregate v. separable items, prices, etc.

BIDS
Competitive system
Territories and possessions
American Samoa